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Supreme Court of the United States

October Term, 1947
No. 409

GEORGE E. EDDY and SAMUEL SILBIGER,

Petitioners,

against

LULU R. KELBY, as Executrix of the Last Will and Testament of CHARLES H. KELBY, Deceased, GEORGE C. WILDERMUTH, CHARLES M. McCARTY, PRUDENCE-BONDS CORPORATION AND RECONSTRUCTION FINANCE CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

SAMUEL SILBIGER,
Counsel for Petitioner and pro se.

SUPREME PRINTING CO., INC., 41 MURRAY STREET, N. Y., BARCLAY 7-0349
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

To the Honorable, The Supreme Court of the United States:

George E. Eddy and Samuel Silbiger pray that a writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit made in the above-entitled proceeding, which affirmed the decree of the District Court awarding allowances to counsel for services. Said judgment was by a divided Court, Hon. Jerome N. Frank, dissenting.

Opinions Below

The opinion of the Circuit Court of Appeals and the dissenting opinion are reported in 163 F. 2d 56 and 59.

Jurisdiction

The judgment of affirmance was entered in the Circuit Court of Appeals on July 22nd, 1947.

The jurisdiction of the Court to review the decision of the Circuit Court of Appeals is invoked under Section 240 (a) of the Judicial Code, as amended by Act of Congress of February 13, 1925 (U. S. Code Title 28, Section 347).

Questions Presented

1. Has the petitioner, Samuel Silbiger, been unjustly discriminated against in the awarding of counsel fees for services rendered?

2. Did the Circuit Court of Appeals err in neglecting to apply the rule that the failure by appellants to assign an error, or the failure to urge and argue an alleged error constitutes a waiver by them of that claim?

3. Did the Circuit Court err in denying to petitioner, Samuel Silbiger the sole credit for preserving and recovering for beneficiaries of a trust estate, interest on the sums with which the trustee's accounts were surcharged, and which interest amounted to $483,603.52?

Statement

Prudence Bonds Corporation filed its petition for reorganization on June 29th, 1934. Charles H. Kelby and Clifford S. Kelsey were duly appointed and qualified as Trustees of the Debtor. In due course the Debtor was adjudged insolvent, and plans of reorganization of the Eighteen Series of Prudence Bonds were accepted and confirmed.

By such plans the rights and claims of bondholders against the indenture trustees for any violation of the Trust Indentures, were specifically preserved; and the plans provided for the creation of a new corporation, in which the bondholders were the beneficial owners of the capital stock; for an extension of the maturity of the bonds; for a change of the interest provisions; and for the servicing of the collateral by the New Corporation. (*Central Hanover Bank* v. *President etc. of the Manhattan Company,* 105 F. 2d 130.)

The City Bank Farmers Trust Company became the successor trustee under a Supplemental Trust Agreement for each of the Eighteen series of Prudence Bonds. Such Supplemental Trust Agreements contained no modification of the rights or claims of the bondholders against the original Indenture Trustees, and the Successor Trustee assumed no responsibility for the acts or omissions of its predecessors, and was specifically exempted from any duty to institute any legal or equitable actions therefor against its said predecessors (95).*

The reorganization trustees were authorized and directed to assign all their right, title and interest in the Trust Fund

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* Figures in parenthesis refer to pages of Appendix to Eddy's brief.

collateral securing the Eighteen series of bonds to the New Corporation created pursuant to the plans; and the Corporate Trustees of the respective Trust Funds were authorized to transfer and deliver such funds to their successor, City Bank Farmers Trust Company, and to account for their acts and proceedings and to apply herein for a judicial settlement of their accounts (73, 92).

Charles H. Kelby and Clifford S. Kelsey as Trustees of the Debtor, duly assigned all their right, title and interest in the respective trust funds to the New Corporation by assignment dated March 1st, 1938 (5th Series R. 500).* The respective corporate trustees filed their accounts herein and prayed for a judicial settlement thereof.

Among the accounts were those filed about September 1938 by President and Directors of the Manhattan Company as the trustee respectively of the Fifth and Ninth Series of Prudence Bonds.

Issue was duly joined by the joint objections to such accounts filed by the New Corporation and the Reorganization Trustees; by the objections of bondholders represented by Joseph Nemerov, Esq.; and the objections of petitioner George E. Eddy, a bondholder represented by petitioner Samuel Silbiger. All three sets of objections were filed on the same day, October 2, 1939.

After trial of the issues before Special Master James G. Moore, Esq. he reported and recommended that the President and Directors of the Manhattan Company be surcharged with $1,065,565 as trustee in the Fifth Series and with $148,199.99 in the Ninth Series, and that the objections

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* Refers to Record on Appeal 147 F. 2d 465.

of petitioner Eddy in the Ninth Series be dismissed (80, 136). Separate objections to said reports were filed by petitioner Eddy, and joint objections by the New Corporation, the Trustee of the Debtor and others. Both sets of objections specifically excepted to the failure of the Special Master to recommend that said trustee be also surcharged with interest (60). Petitioner Silbiger alone, however, urged and stressed the point before the District Judge (60, 232). The District Judge overruled all exceptions to the Special Master's reports. A separate appeal to the Circuit Court was taken by petitioner Eddy and a joint appeal by the New Corporation and the Trustee of the Debtor. On said appeals the separate brief of petitioner Silbiger, as attorney for petitioner Eddy, alone assigned as error the failure to charge the bank with interest (60, 233). The joint brief of the New Corporation in the Circuit Court did not urge or contend that the failure to charge interest constituted error (233).

On the said appeal *of petitioner Eddy,* the decrees of the District Court were modified, and on the Circuit Court's Mandate to charge the bank with interest, the District Judge fixed the rate of interest at 3% (81) and thereby an additional sum of $425,617.72 was recovered for the Trust Fund in the Fifth Series and $57,985.80 in the Ninth Series, a total increase for both series of $483,603.52 (84).

The applications of the bank to this Court for writs of certiorari were denied, 319 U. S. 757 (84). Judge Kelby passed away on May 31, 1944 and he did not participate in the appeals to the Circuit Court, nor in the opposition in this Court to the bank's petitions for writs of certiorari (243).

As a result of the said decisions, President and Directors of the Manhattan Company on May 16, 1945 paid into the Fifth Series Trust Fund the sum of $1,572,991.93 and in the Ninth Series $208,132.16.

Thereafter the attorneys for the several parties applied to the District Court for allowances and the sums requested and awarded were as follows:

Applicant	*Requested*	*Awarded*
Estate of Charles H. Kelby, Deceased, Trustee of Debtor	$ 90,000.00	$60,000.00
Samuel Silbiger, Attorney for George E. Eddy	200,000.00	40,000.00
Charles M. McCarty, Attorney for Prudence Bonds Corporation	35,000.00	35,000.00
Joseph Nemerov, Attorney for Hilda S. Riese, *et al.*, ...	110,000.00	30,000.00
Prudence Bonds Corporation (expenses)	12,483.88	12,483.88
Prudence Realization Corporation (expenses)	749.73	749.73

Petitioners appealed by permission of the Circuit Court from the allowances to the Estate of Charles H. Kelby, George C. Wildermuth, Charles M. McCarty and Samuel Silbiger.

The Circuit Court recognized that the services rendered by the respective attorneys in the cases of *Central Hanover Bank and Trust Co.* v. *President etc. of the Manhattan Company,* 105 F. 2d 130; *Manufacturers Trust Co.* v. *Kelby,*

125 F. 2d 650; *Brooklyn Trust Co.* v. *Kelby,* 134 F. 2d 105; *President & Directors of the Manhattan Co.* v. *Kelby,* 147 F. 2d 465, were important factors in evaluating the services of counsel. In the *Central Hanover* case, which laid the foundation on which the ultimate results were achieved, the late Charles H. Kelby, George C. Wildermuth, Esq., and Joseph Nemerov, Esq., did not represent any party or participate and take any part (238). In *Manufacturers Trust Co.* v. *Kelby,* the late Charles H. Kelby performed no legal services and was represented by George C. Wildermuth, Esq. (238-239); in the case of President & Directors of the Manhattan Co., the late Charles H. Kelby did not participate in the appeal to the Circuit Court (241), nor did he render any service in connection with the petitions made to this Court by Manufacturers Trust Company and President and Directors of the Manhattan Company for writs of certiorari (239, 241).

The unanimous opinions of the Circuit Court in the cases of *Brooklyn Trust Co.* v. *Kelby,* 125 F. 2d 650 and *President & Directors of the Manhattan Company* v. *Kelby,* 147 F. 2d 465 were wrtten by Hon. Jerome N. Frank. Although he was undoubtedly best qualified to evaluate the services rendered by the respective counsel in the important phases of the litigation in the Circuit Court, his opinion as to the value of petitioner Silbiger's services was not accepted.

Specification of Errors

1. The Circuit Court of Appeals erred in denying to petitioner Silbiger the sole credit for increasing the recoveries herein by the items of interest aggregating $483,603.52.

2. The Circuit Court of Appeals erred in deciding that the New Corporation and the Trustees of the Debtor preserved the rights of the bondholders as to the claim for interest.

3. The Circuit Court of Appeals erred in failing to decide that the bondholders are the sole beneficiaries of the respective trust estates and the only real parties in interest.

4. The Circuit Court of Appeals erred in affirming the decisions of the District Court whereby $115,000.00 out of a total award of $185,000.00 for counsel fees, was allowed to counsel who did not represent any real parties in interest, and to be paid out of funds belonging to petitioner Eddy and other bondholders.

5. The Circuit Court of Appeals erred in arbitrarily disregarding the uncontradicted expert testimony of Hon. Charles H. Tuttle in so far as such testimony is consistent with usage and precedent and is reasonable.

6. The Circuit Court of Appeals erred in deciding that the award of $40,000.00 to petitioner Silbiger is adequate compensation for the services rendered by him.

Reasons for Granting the Writ

The Circuit Court of Appeals predicated its judgment upon its decision that the rights of the bondholders was preserved by counsel for the New Corporation and the Trustees of the Debtor, although said counsel neither assigned as error the failure of the Court below to award interest, nor urged or discussed such claim in their brief. Such decision ignores Rule 19 of the Circuit Court which reads:

> "(a) The brief for appellant shall contain in the order stated
>
> (1) A concise abstract or statement of the case, presenting succinctly the questions involved, the manner in which they are raised, *and the errors claimed*; * * *." (Emphasis supplied.)

The decision of the Circuit Court in that respect is in conflict with the decisions of this Court in *Southeastern Express Co.* v. *Robertson,* 264 U. S. 541, *Yesionowski* v. *Boston & Maine R. R. Co.,* 329 U. S. 452; and conflicts with the decisions of the Circuit Court of Appeals in other circuits. See *McNamara* v. *Hart,* 83 F. (2d) 649 (C. C. A. 8); *Jackson* v. *Fuller,* 85 F. (2d) 816 (App. D. C.); *American Ins. Co.* v. *Scheuffler,* 129 F. 2d 143 (C. C. A. 8), cert. denied 317 U. S. 687; *Schroepfer* v. *A. S. Abell Co.,* 138 F. 2d 111 (C. C. A. 4) cert. denied 321 U. S. 763.

The decision of the Circuit Court in so far as there is implicit therein a determination of the status of parties to file objections to a trustee's account, is in conflict with applicable decisions of the Courts of New York State. See, *Hart* v. *Goadby,* 138 App. Div. 160; 123 N. Y. S. 166.

Also, the decision of the Circuit Court insofar as it affirms the decision of the District Court and sustains the award of counsel fees to counsel for parties who are not "*jointly* interested with others in a *common* fund" conflicts with equitable principles and the rule established by this Court in *Trustees* v. *Greenough*, 105 U. S. 527 and *Central R. R. Co.* v. *Pettus*, 113 U. S. 116.

In the interests of equity and justice the decision of the Circuit Court of Appeals for the Second Circuit should be reviewed by this Court.

WHEREFORE, your petitioners respectfully request that a Writ of Certiorari be granted as prayed.

GEORGE E. EDDY,
SAMUEL SILBIGER,
Petitioners.

STATE OF NEW YORK, }
COUNTY OF KINGS, } ss.:

SAMUEL SILBIGER, one of the petitioners herein, being duly sworn, says that he has read and knows the contents of the within petition and the same is true in all respects as he verily believes.

SAMUEL SILBIGER.

Sworn to before me this
18th day of October, 1947.

FRANCES WITOFF
Notary Public in the State of New York
Residing in Kings County
Kings Co. Clk's No. 129, Reg. No. 312-W-8
Commission Expires March 30, 1948

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Respondents.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I

The Denial of the sole credit to petitioner Silbiger for the recoveries of the items of interest aggregating $483,603.52 is unjust and constitutes reversible error.

The increase of the judgments in the aggregate sum of $483,603.52 resulted from the appeals taken to the Circuit Court in the case of *President and Directors of the Manhattan Company* v. *Kelby,* 147 F. 2d 465. The decision was unanimous and on the question of interest stated:

> "Appellee Eddy urges that the Court and Master erred in not surcharging the bank with interest on each improper withdrawal from the date thereof.* We think it should be so charged."

In a footnote as indicated after the word "thereof" the Court said:

> "Exceptions to the Master's report on that ground were filed in the Court below."

The language of this opinion is clear and unequivocal and not subject to dual interpretation. The opinion was written by Hon. Jerome N. Frank, and assuming that it was ambiguous and capable of more than one construction, no-one was better qualified to resolve the ambiguity, and state the true intent than the Judge who expressed the opinion of the Court. He states in his instant dissenting opinion, "it is clear that, had it not been for Silbiger's brief on the appeal in *Bank of Manhattan* v. *Kelby, supra,* there would have been no recovery of interest."

Neither of the two Judges who concurred in the majority opinion sought to be reviewed sat or participated in the said *Bank of Manhattan* v. *Kelby* case, yet they rejected this interpretation of their colleague, and sought to justify their affirmance of the decree of the District Court by a ruling that with respect to the question of interest, "the other parties seem to have preserved their rights". Such ruling is not supported by any established precedents, and as pointed out in the dissenting opinion of Judge Frank, is contrary to controlling authorities.

It is undisputed that the joint brief of Messrs. McCarty, Wildermuth and Nemerov did not claim that the failure to award interest constituted error, as is necessary under Rule 19 of the Circuit Court of Appeals for the Second Circuit, nor did they urge or argue the claim in their brief. Clearly therefore they waived and abandoned said claim, and by no fair judgment are they entitled to any credit for obtaining for the bondholders such additional sum of $483,603.52.

Southeastern Express Co. v. *Robertson,* 264 U. S. 541;

Yesionowski v. *Boston & Maine R.R. Co.*, 329 U. S. 452;
McNamara v. *Hart*, 83 F. 2d 649 (C. C. A. 8);
Jackson v. *Fuller*, 85 F. 2d 816 (App. D. C.);
Loomis v. *Wattles*, 266 Fed. 876.

In the case last cited, at page 878, the Court said:

> "The assignment of error relating to the allowance of interest is not argued, and will be deemed abandoned."

The denial, therefore, of sole credit to petitioner Silbiger for obtaining the additional sum of $483,603.52 for the benefit of the Fifth and Ninth Series Trust Fund, is a material error of law; the premise upon which the District Court predicated the awards to respective counsel and upon which the majority opinion of the Circuit Court affirmed the same, is false, and the conclusion based on such false premise is necessarily erroneous, and prejudicial to petitioner Silbiger.

II

The Bondholders are the sole beneficiaries of the Trust Estates and the only real parties in interest. Petitioner Silbiger represented bondholders and the allowance awarded him is inadequate, unjust and disproportionately small as compared to the awards made to counsel who represented no party in interest.

The various stages of the litigation, extending over a period of approximately seven years involved several milestones through the District Court, the Circuit Court of Appeals and in this Court over the difficult road to ultimate success, and whether the several counsel to whom allowances were awarded participated therein, are as follows:

Title of Proceedings	*Silbiger*	*Kelby*	*Wilder-muth*	*Nemerov*	*Mc-Carty*
Litigation on jurisdictional Question — Central Hanover Bank & Trust Co. v. President and Directors of the Manhattan Co., 105 F. 2d 130	Yes	No	No	No	Yes
*Preparations for and Trial of Third Series	Yes	No	Yes	Yes	Yes
Litigation in re: Manufacturers Trust Co. v. Kelby, 125 F. 2d 650	Yes	No	Yes	Yes	Yes
Opposition to Application for Writ of Certiorari which was denied in 316 U. S. 697	Yes	No	Yes	Yes	Yes
Litigation in re: Brooklyn Trust Company v. Kelby, 134 F. 2d 105	Yes	Yes	No	Yes	Yes
Opposition to Application for Writ of Certiorari which was denied in 319 U. S. 767	Yes	Yes	No	Yes	Yes
Trial of Fifth and Ninth Series	Yes	Yes	No	Yes	Yes
Appeal—President & Directors of Manhattan Company v. Kelby, 147 F. 2d 465	Yes	No	Yes	Yes	Yes
Instrumental on said appeal in obtaining modifications on question of interest resulting in increase of $483,603.52 on recovery	Yes	No	No	No	No
Opposition to Application for Writ of Certiorari which was denied. 324 U. S. 866	Yes	No	Yes	Yes	Yes

* I have included this milestone in fairness to Mr. Wildermuth because the Third Series accounting was the first to be tried, and although compromised and settled before adjudication, it formed the norm or pattern for the subsequent trials of all other series including the instant cases. Mr. Wildermuth conducted the trial of said Third Series by agreement made with Mr. Silbiger (Rec., *Manufacturers Trust Co.* v. *Kelby,* 125 F. 2d 650, p. 234, f. 702).

An examination of the Special Master's report herein, read in the light of the established facts as to the participation of respective counsel in the various proceedings that led to the enrichment of the bondholders, clearly discloses the unfair discrimination made against petitioner Silbiger in his appraisal of the relative value of the services rendered.

The only attorney, the value of whose services was determined by him to be dependent upon the *time necessarily consumed* to these proceedings was petitioner Silbiger. To justify the allocation of the largest proportionate fee to Judge Kelby's estate he erroneously reported that Judge Kelby "rendered services in connection with every phase of the litigation which resulted in the recoveries in the Fifth and Ninth Series," although Judge Kelby had no part in the *Central Hanover* case, the issues in which the Special Master himself characterized as "important" and "crucial" and which laid the solid foundation for the subsequent recoveries herein. The fact is that Judge Kelby did not participate in seven out of ten important and critical stages or phases of the litigation, including three appeals to the Circuit Court of Appeals, and the opposition to petitions for two writs of certiorari in this Court.

The Special Master placed an unwarranted construction on the language of the Court in *Manufacturer's Trust Company* v. *Kelby*, 125 F. 650 wherein it stated:

> "Finally, although we cannot quite see any reason for allowing the reorganization trustees to intervene, the matter was one for the decision of the district judge within the discretion vested in him by Rule 24(b)(2). The only practical considerations against their intervention are the danger of confu-

> sion arising from the presence of too many parties, and the possible increases in the allowances and costs. We cannot see why there should be any undue confusion, if the objectors continue in a single brief as they have on this appeal, and the district court will no doubt see to it that no unnecessary legal services are rewarded."

This language was construed by the Special Master as particularly applicable to petitioner Eddy, whom he deemed an intervenor, and as constituting the reorganization trustees and the New Corporation as the real parties in interest, and it was on such misinterpretation that he made his recommendations of the allowances to the respective counsel, which was confirmed by the District Court and affirmed below by the majority of the Circuit Court, one judge dissenting.

But the facts are just the reverse. The only interested parties are the bondholders. By the plan of reorganization herein the rights of the bondholders were not assigned to the New Corporation and nowhere in the record can the New Corporation point to any such assignment, nor did the Special Master make any finding that such assignment was ever made. He did find that the New Corporation succeeded to all the right, title and interest of the Debtor, and that it was authorized "to take over and perform the servicing of the collateral underlying the eighteen series of bonds."

The Circuit Court in the *Central Hanover* case interpreted the Plans of Reorganization of the Debtor and found with respect to the eighteen trust funds or "pools".

> "There was no equity in any of the pools, and the debtor had no free assets; nor did the new com-

pany, except for its right to 'service' the bonds * * *."

The right to service the collateral did not confer any title and cannot be construed as an assignment or transfer of the collateral. The title to such collateral was not vested in the New Corporation, but in City Bank Farmers Trust Company as the successor trustee in all eighteen series of bonds. The right of the New Corporation to "service" the collateral was an agency right created under the power of attorney conferred upon it by the terms of the Supplemental Trust Indenture. It acquired no interest in the collateral and it never became a real party in interest with respect to the claims of the bondholders against the Indenture Trustees in the instant case.

It is the established rule in the Federal Courts that an action is maintainable only by real parties in interest. Rule 17 of the Federal Rules of Civil Procedure provides:

> "Rule 17. *Parties Plaintiff and Defendant; Capacity.* (a) *Real Party in Interest.* Every action shall be prosecuted in the name of the real party in interest; * * *."

A similar rule prevails in New York State. Sec. 210 of the New York Civil Practice Act reads:

> "§210. *Action to be brought in name of real party in interest.* Every action must be prosecuted in the name of the real party in interest, * * *."

See:

Spencer v. *Standard Chemical and Metals Corporation*, 237 N. Y. 479;
Titus v. *Wallick*, 306 U. S. 282.

Likewise, in a derivative or representative action, such as the assertion of the bondholders' claims in the instant cases against the accounting trustees, the party asserting the claims and maintaining the action must establish not only that numerous parties have a common or general interest, but that the one asserting the claims is united in interest with the numerous parties he purports to represent. This is the settled rule and practice in the Federal Courts, and also is the law in New York State.

Rule 23a(1) Federal Rules of Civil Procedure;*
Sec. 195 New York Civil Practice Act;**
Clark v. *Chase National Bank of City of New York*, 45 Fed. Supp. 820;
Brenner v. *Title Guarantee & Trust Co.*, 276 N. Y. 230, at 235, 236;
Kahn v. *New York Life Ins. Co.*, 184 Misc. 417, 53 N. Y. S. 2d 575;
Meyer v. *Lowry*, 257 App. Div. 81; 12 N. Y. S. 2d 177.

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* "Rule 23 Class Actions.

(a) *Representation.* If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is (1) joint, or common, or secondary in the sense that the owner of the primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;".

** §195. *Suing for benefits of others*: Where the question is one of a common or general interest of many persons or where the persons who might be made parties are very numerous and it may be impracticable to bring them all before the Court, one or more may sue or defend for the benefit of all.

Manifestly therefore, since neither the New Corporation nor the Reorganization Trustees held any of the bonds secured by the several trust funds, neither was a real party in interest; neither had any legal status or capacity to sue on behalf of the bondholders—and the rights of the bondholders were not preserved by reason of their participation in the accounting proceedings. The principal parties to the litigation, entitled to the status of "domini liti" were the bondholders. By treating petitioner Eddy as an "intervenor" and not as representative of the real parties in interest, the awards of counsel fees by the District Court were predicated on an erroneous theory of the law, and the awards so made and confirmed by the divided Circuit Court of Appeals are obviously inequitable and unjust to petitioner Silbiger.

The proper equitable rule application in the instant case is that enunciated by this Court in *Trustee* v. *Greenough*, 105 U. S. 527, in the following language:

> "One *jointly interested* with others in a *common fund* who, in good faith maintains necessary litigation to save it from waste, and secure its proper application, is entitled in equity to the reimbursement of his costs, as between solicitor and client, either out of the fund itself or by proportionate contribution from those who receive the benefit of the litigation." (Italics supplied.)

See also:

Hobbs v. *McLean*, 117 U. S. 567;
Central R. R. Co. v. *Pettus*, 113 U. S. 116.

III

The Court below erred in totally disregarding the uncontradicted expert testimony of Hon. Charles H. Tuttle in so far as such testimony is consistent with usage and precedent and is reasonable.

The majority opinion below laid stress on the view of the "well known counsel for the defeated bank" and accepted his opinion at par in so far as it related to the compensation of Mr. McCarty, the attorney for the New Corporation--but totally rejected the view of the same counsel in so far as he stated in his affidavit "Practically the entire case was presented to the Special Master in the form of Stipulations (279) and that Mr. Silbiger "was the only attorney for the objectants who had the effrontery seriously to present such an argument" (as to the interest).

Also the majority opinion was greatly influenced by what it erroneously assumed were *disinterested* opinions of the Reconstruction Finance Corporation.*

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* The Circuit Court misapprehended the relation of Reconstruction Finance Corporation to these proceedings. The Board of Directors of the New Corporation is weighted down by former officers and directors of the Debtor and of the Prudence Company Inc. the guarantor of the Debtor's Bonds (R. 147 F. 2d 465, 613-624) together with Jerome Thralls, Special Representative of Reconstruction Finance Corporation (R. 147 F. 2d 465 at p. 618). Reconstruction Finance Corporation became the sole owner of all the capital stock of the Prudence Co. Inc. and under the reorganization of that company became the largest single stockholder of its successor Prudence Realization Corporation, which now holds $1,910,300, of the Subordinated bonds in the respective eighteen series; $67,200 of which are 5th Series and $105,700 are Ninth Series Bonds. In a companion case, now awaiting decision of the Circuit Court, Prudence Realization Corporation is asserting a right to payment of such bonds although the deficiency in the payment of the interest on the priority publicly held bonds at the guaranteed rate as of August 1st, 1945, is $411,783.18 in the 5th Series and $604,606.17 in the Ninth Series.

However, it totally disregarded, without comment, the expert testimony of Hon. Charles H. Tuttle to the effect that the reasonable value of Mr. Silbiger's services was $220,000 (407). In so doing it deviated from the rule laid down by this Court in *Head* v. *Hargrave*, 105 U. S. 45 wherein it stated:

> "The evidence of experts as to the value of professional services does not differ in principle from such evidence as to the value of labor in other departments of business, or the value of property,*** and while great weight should be given to the opinion of those familiar with the subject, they are not to be blindly received, but are to be intelligently examined by the jury in the light of their own general knowledge; they should control only as they are found to be reasonable."

Mr. Tuttle's opinion was predicated on long experience at the bar and he supported his opinion by a series of precedents set forth in Silbiger's Exhibit 13, being an extract from an article on counsel fees, by George D. Hornstein in Columbia Law Review, Vol. 39, 1939 at page 784.

Mr. Tuttle testified that in his opinion a reasonable percentage of any recoveries that should be awarded counsel as compensation for services rendered on a contingent basis is between 18-2/3% and 45% and that in the instant cases 25% was fair and reasonable and in accordance with the precedents established by the Courts (426).

The testimony of Mr. Tuttle was reasonable; it was that of a disinterested witness, and in the absence of contradiction should have been weighed by the Court and accepted as controlling to the extent that the Court was able to find it reasonable.

Conclusion

The fees awarded to respective counsel throughout these proceedings are completely broken down in the appendix to Eddy's Brief, pages 21 to 23. In the light of the interests represented respectively by counsel and the necessity for the rendition of services only by counsel for the real parties in interest—a perusal of the allowances heretofore made* and those now sought to be reviewed clearly indicates the unfair discrimination against petitioner Silbiger, and amply justifies the unusually strong statement in the dissenting opinion below that "Silbiger has been shockingly underpaid". The writ prayed should be granted.

Dated: October 18th, 1947.

SAMUEL SILBIGER,
Counsel for Petitioner and pro se.

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* In the October Term, 1942 of this Court, the petitioners applied for a writ of certiorari to the Second Circuit to review the allowances made in connection with Series A. A., Third, Fourth, Seventh and Seventeenth (21) after the Circuit Court denied them leave to appeal and dismissed the appeal taken by them as of right. This Court denied the writ, 319 U. S. 755.